✓PRE-RAM

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

(1) No. 1001-1002

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY,

Petitioner,

v.

CHARLES H. KELBY, CLIFFORD S. KELSEY, Trustees of the Debtor, PRUDENCE-BONDS CORPORATION (NEW CORPORATION), GEORGE E. EDDY, and HILDA S. REESE.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN LORD O'BRIAN,
J. M. RICHARDSON LYETH,
MARK W. MACLAY,
CHARLES A. HORSKY,
Counsel for Petitioner.

INDEX

CASES CITED

OTHER AUTHORITIES

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President and Directors of The Manhattan Company prays that writs of certiorari issue to review two orders of the United States Circuit Court of Appeals for the Second Circuit entered on February 16, 1945 (R. 657),* affirming in part and modifying in part two decrees entered on March 28, 1944, by the District Court for the Eastern District of New York (R. 11).

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* Unless otherwise indicated references are to the Fifth Series record.

Opinions Below

The opinion of Judge Inch in the District Court for the Eastern District of New York (R. 617-621) is not officially reported. The opinion and supplemental opinion in the Circuit Court of Appeals (R. 632-655) are not yet reported.

Jurisdiction

The orders of the Circuit Court of Appeals, review of which is sought, were entered on February 16, 1945 (R. 657). The jurisdiction of this Court is conferred by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

1. Whether the decision of the Court below is in conflict with the applicable state law in holding that a technical breach of trust, with no elements of fraud, self-dealing, self-enrichment, or the like warrants a surcharge against the Trustee even though no loss to the trust fund or beneficiaries resulted from the breach.

2. Whether the decision of the Court below is in conflict with the applicable state law in holding that assignees of bonds, who were not holders thereof at the time of the breach of trust, may maintain a representative action against the Trustee for a surcharge.

3. Whether the decision of the Court below is in conflict with decisions of this Court in failing to direct appropriate litigation in the state courts to obtain a conclusive determination as to the applicable state law.

Statement

Prudence-Bonds Corporation (hereinafter referred to as the Debtor) filed its petition for reorganization under Section 77B of the Bankruptcy Act, and in 1938 a general plan of reorganization was approved, together with plans of reorganization for various bond issues, including Prudence-Bonds, Fifth Series and Ninth Series of which petitioner (hereinafter referred to as the Trustee) was Trustee. Pursuant to court order in the reorganization proceedings (R. 22), the Trustee filed its accounts, as Trustee under the Fifth and Ninth Series, and prayed for a judicial settlement and approval. Objections having been filed by Prudence-Bonds Corporation (New Corporation), the Reorganization Trustees, and certain individual bondholders (R. 83-125), hearings were had before a Special Master, who recommended surcharges against the Trustee in each Series (R. 519-575). The facts adduced at those hearings, which are material to the present petition are as follows: *

From 1920 to 1931 the Debtor issued eighteen series of its Prudence-Bonds which were sold to the public, each

* The trust agreements in the two series are substantially identical and the questions presented are the same. For simplicity we state only the facts relating to the Fifth Series with references to the record in that proceeding.

secured by a group of mortgages deposited with a bank under a trust agreement.*

The fundamental scheme of the trust agreement was that (1) the face amount of the collateral in the trust fund should equal, but need not exceed, the face amount of Prudence-Bonds outstanding, (2) the Prudence-Bonds maturing serially every six months should have collateral of an equal face amount maturing six months before or three months after each maturity of Prudence-Bonds, and (3) the pledged collateral and the proceeds of its collection were to be used as a revolving fund to pay the serial maturities of the Debtor's bonds, which were substantially matched against the serial maturities of the collateral. In order to secure its effective operation as such a revolving fund the trust agreement expressly permitted the Debtor to collect and retain interest and principal upon the collateral (R. 316) for the purpose of enabling the Debtor to use such proceeds to pay off its bonds. Two alternative methods of securing that result were provided: (1) The Debtor could deposit monthly with the Trustee cash collections of principal upon the collateral (R. 332), pay off serially maturing bonds with its own money, turn them in to the Trustee for cancellation and reimburse itself by withdrawing cash to the extent of the excess of the face amount of collateral over the face amount of Prudence-Bonds outstanding (R. 317-318); or (2) The Debtor could retain the cash collections, use them to pay an equivalent amount of bonds maturing within six months, and surrender the bonds to the Trustee in lieu of the cash collected (R. 332).

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* The bonds were also guaranteed by the Prudence Company, Inc., but the guarantee is not relevant to the issues here involved. The actual procedure by which the mortgages became collateral for the bonds is stated at R 540-1.

The Debtor largely made use of the first alternative. At various times cash and mortgages were released by the Trustee to the Debtor as excess collateral when the face principal amount of the collateral exceeded the face principal amount of outstanding bonds of the various maturities (R. 556-560). At the times of many of such releases one or more mortgages in the collateral were in default as to semi-annual installment or monthly deposit payments of principal. The Trustee, however, believed in good faith (R. 572), that excess collateral was to be computed without regard to minor defaults of this character and continued to release to the Debtor excess cash and mortgages (R. 555-568). Until June 30, 1931, the defaulted installments of principal on mortgages in the collateral were all cured either by payment or by withdrawal and substitution by the Debtor of cash or non-defaulted mortgages for defaulted mortgages (R. 568). The Special Master dismissed all objections to the releases of cash, aggregating $2,140,351.89 and of mortgages, aggregating $1,004,000, prior to that date (R. 572-573)—which is referred to as the last "clear day"—because no damage to the trust fund resulted therefrom (R. 530). No exception was filed to that ruling.

After June 30, 1931, one mortgage became in default in a principal installment of $510, and this default was never cured (Obj. Exh. 5-13, Sch. 2, p. 14). On October 25, 1931, another mortgage became in default in a principal installment of $2,500 and this default was never cured (*ibid.*). From June 30th to November 30th, when the total defaults in principal installments which were never cured aggregated $3,010, the Trustee released to the Debtor $846,840 of cash as excess collateral (R.

559-560). In total, the Trustee was surcharged with $1,065,565—$949,965 in cash releases and $115,600 as the face amount of one mortgage—released to the Debtor after June 30, 1931 (R. 572-573).

All of the releases of cash to the Debtor for which the Trustee was surcharged were in reimbursement for bonds paid off and delivered by the Debtor to the Trustee for cancellation, or in exchange for such bonds. All of the cash received into the trust fund after June 30, 1931, consisted of collections of principal on the mortgage collateral. The releases of excess collateral were made possible because, during the same period, the Debtor paid off and the Trustee cancelled, serially maturing bonds in an amount substantially in excess of the amount of cash released (Acct. Exh. 5-5). After June 30, 1931, $949,965 cash was released by the Trustee and $1,018,300 face amount of serially maturing bonds were paid and cancelled (R. 64-68, 78-80).

Despite these facts, the District Court approved the report of the Special Master, and ordered the Trustee to pay the sum of $1,066,257.38, with costs (R. 15), with leave to apply at the foot of the decree in the event that any surplus remains after full payment of the publicly-held Fifth Series bonds (R. 17). The District Court based its ruling upon the ground that the withdrawals permitted by the Trustee were improper, though in good faith (R. 618), and that, without regard to any other consideration, the amounts must be restored (R. 620-621).

The Court below, concurring in the judgment of the District Court, held that (1) the trust agreement did not permit the withdrawals of the excess collateral while any default, no matter how trivial, existed in any principal

payment (R. 633-642); (2) New York decisions did not restrict the right of suit to those bondholders who held their bonds at the time the alleged wrong was committed by the Trustee (R. 643-645); (3) New York decisions did not require a showing that damage to the trust fund had resulted from the alleged breach of trust (R. 645-647). With certain modifications of the decree of the District Court not now materal, including the imposition of interest upon the amount of the surcharge from 1931, the decree was affirmed (R. 655).

Specification of Errors To Be Urged

The Circuit Court of Appeals erred:

1. In disregarding and failing to apply the law of New York that a trustee, not guilty of fraud, self-dealing, or self-enrichment, will not be surcharged unless it appears that the loss or damage to the trust fund or beneficiaries resulted from the breach of trust.

2. In disregarding and failing to apply the law of New York that, except in the case where the Trustee has itself received a part of the trust assets, a cause of action against the Trustee for breach of trust may be maintained only by the individual holders of the bonds who held them at the time that the breach of trust occurred.

3. In failing to direct appropriate action in the state courts by which the disputed questions of state law could be finally and authoritatively determined.

4. In affirming the order of the District Court.

Reasons for Granting the Writs

By this petition, a review is not sought of the proper interpretation of the trust agreement, although we believe the decision below was erroneous. No question of fact is presented or sought to be reviewd.

I

The decision below surcharging the Trustee even though the breach of trust was not the cause of a loss to the trust fund is a decision upon an important question of New York law in probable conflict with the controlling New York decisions.

As the statement, *supra,* indicates, the Court below has ruled that the Trustee is surcharged despite the absence of any causal relationship between the acts of the Trustee and the loss to the trust fund.

It would be difficult to imagine a case in which the absence of proximate cause is so apparent. The Special Master held that amounts released before June 30, 1931—the last clear day—resulted in "no ascertainable diminution of the trust fund" (R. 530). This was because the releases had been accompanied by corresponding reductions in the amount of outstanding bonds. After the last clear day, however, the Special Master surcharged the Trustee for the entire amount of the cash released by it with no credit for the bonds paid off and for the resulting diminution of liabilities of the trust fund.

During the period from June 30 to November 30, 1931, the Trustee released to the Debtor $846,840 (R. 64, 65) and bonds were paid off and cancelled in the amount of $924,700 (R. 78, 79). During that same period the de-

faults in payments on mortgages which were never cured totaled only $3,010 (Obj. Exh. 5-13, Sch. 2, pp. 12, 14). The total cash releases after June 30 (including those after November 30), for which the Trustee was surcharged were $949,965 (R. 64-68). During the same period $1,018,300 of bonds were paid off and cancelled and the liabilities of the trust fund were reduced in that amount (R. 78-80). The releases after June 30 resulted in "no ascertainable diminution of the trust fund" for the same reason applicable to releases prior to that date. Thus, the amount of the surcharge did not depend on damage to the trust fund nor is it derived from any legal concept of damages. It depended solely on the fortuitous dates on which defaults occurred which were not later cured. The real cause of the damage to the trust fund is what the Court below called the "Great Depression" (R. 648).

There are, of course, certain types of wrongful acts for which a trustee is held to absolute liability, such as fraud, self-dealing, making a profit or the like. Scott, *Trusts*, 1939, Section 205.1. In order to deter trustees from committing such breaches of trust liability is imposed in such cases even though there is no causal connection between the breach of trust and the loss. This is as true in New York as it is elsewhere. The present case is clearly not such a case. Here the Court below has decided that the Trustee misinterpreted a trust agreement. The Trustee was guilty of no fraud or bad faith, the releases were not made with the intention of circumventing the trust agreement, the Trustee did not realize any profit or gain from any of the challenged transactions (R. 571-572) and obviously the Trustee was not guilty of self-dealing. In every respect the releases of cash to pay off serially maturing bonds of the Debtor were simply the normal and usual transactions which would have been

unobjectionable but for the minor defaults in installments of principal which were never cured.

The Court below, however, has purported to find in the New York decisions a justification for imposing absolute liability even on a Trustee who has been guilty of only a misinterpretation in good faith of a trust agreement, involving no fraud, self-dealing, or profit to the Trustee. The opinion states (R. 647) that "the New York cases do not provide an explicit underlying rationale which would govern the situation in the instant case", but absolute liability is imposed upon the Trustee notwithstanding. The decision below is in conflict with the New York decisions and with decisions in many other jurisdictions.

The leading case in New York on the question whether a trustee who acts in good faith may be surcharged even though the breach of trust is not the proximate cause of a loss is *Matter of Adriance*, 145 Misc. 345 (Surr. Ct., Kings Co., 1932). A testamentary trustee invested in bonds represented to be secured by a building completed and partly rented. In fact, the building was not built, but it was later completed and the bonds then became a legal investment when they were selling at par. The court refused to surcharge the trustee, because the unauthorized act was not an effective cause of the loss resulting from the later shrinkage in market values resulting from the depression. That case was not appealed but has been consistently followed in many other cases in New York. *Matter of Turner*, 156 Misc. 68 (Surr. Ct., Orange Co., 1935); *Irving Trust Co.* v. *Natica*, 157 Misc. 32 (Sup. Ct., N. Y. Co., 1935); *In re Toel's Estate*, 39 N. Y. S. 2d 898 (Surr. Ct., N. Y. Co., 1943). See also *Matter of Beebe*, ~~N. Y. Law Jour., 3/22/43, p. 1123~~

52 N.Y.S. 2d 736

aff'd. 52 N.Y.S. 2d 796.
(Surr. Ct., Kings Co.). *Matter of Adriance* has never been overruled or criticized by any New York appellate court.

In *Matter of Harris*, 169 Misc. 943 (Surr. Ct., N. Y. Co., 1938), the trustee had failed to earmark securities and kept them in the name of the trustee. The court refused to surcharge the trustee, however, for losses resulting from the depression which bore no relation to the breach of trust. The same result was reached in *In re Kirby's Estate*, 35 N. Y. Supp. 2d 651 (Surr. Ct., Westchester Co., 1942). Again, in *In re First National Bank of City of N. Y.*, 25 N. Y. Supp. 2d 221 (Sup. Ct., N. Y. Co., 1941), the court refused to surcharge a trustee for failure to diversify securities and to follow a regulation of the Federal Reserve Board, when the record failed to establish that either breach was a cause of the loss.

The Court below, however, refused to accept those decisions as it is required to do under *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169 (1940). It cited (R. 646) cases in which the trustee had been guilty of self-dealing, in which, undoubtedly the rule of absolute liability prevails. It cited (*ibid.*) cases in which the trustee had purchased from itself participating shares in a mortgage without giving the notice to the beneficiaries required by Section 188(7) of the Banking Law—cases which are akin to the self-dealing cases, and in which the investment is plainly illegal unless the notice is given. That is, the statutory notice is the legalization of what would otherwise be self-dealing. *Matter of Bearns*, 251 App. Div. 222 (1st Dept., 1937), aff'd 276 N. Y. 590. And finally the court cited (*ibid.*) cases of illegal investments, where the causal relationship between breach and loss is obvious.

The Court below cited no cases where a trustee has been surcharged, as here, unless he was found guilty of fraud, or self-dealing, or profiting from the breach of trust, or unless there was a causal connection between the breach of trust and the loss to the trust fund or beneficiary. There are no such cases.

The rule established by these New York cases, requiring causal connection between the breach of trust and loss to support a surcharge against a trustee not guilty of fraud, self-dealing, self-enrichment and the like, is not peculiar to New York but has been applied in decisions of the Circuit Court of Appeals of the Sixth Circuit and courts of last resort of eleven states. *Potter* v. *Union & Peoples Nat. Bank*, 105 F. 2d 437 (C. C. A. 6, 1939); *Matter of Darlington*, 245 Pa. 212 (1914); *Chapter House Circle* v. *Hartford Nat. Bank & Trust Co.*, 121 Conn. 558 (1936); *Carey* v. *Safe Dep. & T. Co. of Baltimore*, 168 Md. 501 (1935); *First Nat. Bank of Boston* v. *Truesdale Hospital*, 288 Mass. 35 (1934); *Cox* v. *Camden Safe Dep. & T. Co.*, 124 N. J. Eq. 490 (1938); *In re Lefevre*, 9 Wash. 2d 145 (1941); *Miller* v. *Pender*, 93 N. H. 8 (1943); *Rotzin* v. *Muier*, 134 Neb. 8 (1938); *Voorhies* v. *Blood*, 127 Fla. 337 (1937); *Peoples State Bank* v. *Wade*, 269 Ky. 89 (1937); *First National Bank of Birmingham* v. *Basham*, 238 Ala. 500 (1939).

Indeed, as we have already pointed out, the Court below felt compelled to say (R. 647) that it could find no explicit support in the New York cases for its decision. Actually, its conclusion seems to be rested (*ibid.*) upon a misinterpretation of a quotation from a text book (Scott, *Trusts*, Sec. 205.1), which suggested that absolute liability

is proper if the breach is such that it is necessary to deter trustees from future similar breaches. The Court below misinterpreted this to mean that the Court had discretion in each case to impose absolute liability. Such a doctrine finds no support whatever in any New York decision. Actually, the text-writer was simply advancing a rationale for the rule prevailing both in New York and elsewhere that absolute liability is imposed only in breaches involving such things as fraud, self-dealing, self-aggrandizement, and the like (Scott, *Trusts*, Section 205.1). Nothing in either the text or the New York decisions supports to any degree the conclusion of the Court below that absolute liability may properly be imposed when such factors are absent.

We repeat that no case has been found in New York or elsewhere imposing absolute liability upon a trustee irrespective of causal connection between the breach of trust and the loss in the absence of fraud, self-dealing, self-aggrandizement or the like.

II

The decision below that assignees of bonds who were not holders of the bonds at the time of the breach may maintain this suit is a decision on an important question of New York law in probable conflict with the controlling New York decisions.

Over the objection of the Trustee, the Special Master ruled that Prudence-Bonds Corporation (the New Corporation), the Trustees of the Debtor, and Hilda S. Reese, who purchased her bond in September, 1933 * (R. 550),

* The last release was January 13, 1933 (R. 68).

were entitled to maintain this action, and this ruling was approved by the Court below (R. 643-645). We submit that this ruling on an important question of New York law is contrary to controlling New York decisions.

New York courts have consistently ruled that claims by certificate holders against a depository for permitting allegedly improper withdrawals, releases or substitutions of collateral could not properly be maintained as class actions, but only as individual claims by certificate holders who held their certificates at the time of the alleged breach. *Mittleman* v. *President, etc. of Manhattan Co.*, 248 App. Div. 79, aff'd 272 N. Y. 632 (1936); *Weil* v. *President etc. of Manhattan Co.*, 275 N. Y. 238 (1937); *Hendry* v. *Title Guarantee & Trust Co.*, 255 App. Div. 497, aff'd 280 N. Y. 740 (1939). These cases, in other words, involved wrongs of the same type as those of which complaint is made here. The *Hendry* case, for example, was an action to recover the amount of a condemnation award which had been wrongfully released by the fiduciary.

The Court below, however, refused to accept those cases as authority here on the ground that they involved claims against a depository, as distinguished from a trustee (R. 643-645), following, in this respect, its prior decision in *Manufacturers Trust Co.* v. *Kelby*, 125 F. 2d 650, 652-654 (1942), certiorari denied 316 U. S. 697. Certainly the New York decisions cited above do not enunciate this distinction. And whatever might have been its supposed basis in 1942 when *Manufacturers Trust Co.* v. *Kelby, supra*, was decided, subsequent New York decisions have shown clearly that the New York courts do not recognize any such distinction.

In fact, even before 1942, the New York courts indicated that no such distinction existed. In *Elkind* v. *Chase National Bank*, 259 App. Div. 661, aff'd 284 N. Y. 726 (1940), a bondholders' class action was brought alleging that the trustee had obtained payment to itself of certain unsecured loans made by it to the obligor through a subsidiary corporation which had been used to siphon off the profits and good will of the obligor. The Appellate Division dismissed the action, holding that the good will had not been pledged as part of the mortgage collateral, and that the trustee had not itself received any part of the trust assets. The *Hendry* case was there strongly relied upon.

The *Elkind* case shows that even when the *Kelby* decision was handed down, there was some indication that the New York courts made no distinction between depository and trustee cases. In either type of case, actions must be by individual bondholders who held their bonds at the time of the wrong complained of, except only where the fiduciary itself had wrongfully received part of the trust *res*. In this latter case, a representative action would lie to compel the trustee to restore what it had taken.

In the *Kelby* case, the Court below seized upon this exception, and expanded it to permit a representative action in a case in which the trustee had improperly surrendered a part of the *res* but *without itself receiving anything in return*. 125 F. 2d at p. 653. The Court below, as we have indicated, was compelled to make a distinction between a depository and a trustee, since in the *Hendry* case a representative action had been dismissed which involved precisely similar acts by a depository—improper surrender

by the fiduciary of part of the *res* without receipt of anything in return.

The decisions after 1942, however, conclusively refute any such distinction. In two opinions since that time the New York Court of Appeals has cited and discussed depositor cases—especially the *Hendry* case—as being of equal bearing and authority in cases involving trustees. In *Emmerick* v. *Central Hanover B. & T. Co.*, 291 N. Y. 570 (1943), bondholders individually sued the trustee under a mortgage securing a railway bond issue, alleging that a valuable lease had been permitted to become forfeit. The case was dismissed on the pleadings because it was not alleged that plaintiffs were bondholders at the time of the acts complained of. Again, as in the *Elkind* case, the New York Court of Appeals relied upon the *Hendry* case. The *Kelby* case was the only case relied upon in the briefs of the appellant to distinguish the *Hendry* case, and it proved unavailing.

Still more recently, in *Smith* v. *Continental Bank*, 292 N. Y. 275 (1944), the New York Court of Appeals again indicated that, in the New York courts, there was no distinction in this regard between depository and trustee cases. In the *Smith* case, bondholders sued a trustee charging that it had negligently allowed a valuable leasehold, which was a part of the trust *res*, to become forfeit. The complaint alleged that the plaintiffs owned their bonds at the time of the alleged breach, but did not allege that they were bondholders at the time the action was commenced. The Court, reversing the decision below, held that the right of the bondholders to sue was personal and that ownership at the time of the alleged breach was sufficient. In support of its decision the Court cited and

quoted both trustee and depository cases with no indication whatever that they were not equally relevant on this point.

The Court below in the instant case simply refuses to recognize that the distinction which it has attempted to create in the New York law does not exist, and is in fact denied, by these cases. That the New York Court of Appeals in the *Smith* case quotes from and relies upon the *Hendry* case evoked from the Court below only the comment that "the language of the *Smith* case with reference to the *Hendry* case is not pertinent here" (R. 644-645). Since the *Hendry* case unquestionably involves a similar transaction—an improper release of collateral without anything passing to the fiduciary in return—it would certainly seem that the language of the *Smith* case, which involved a trustee, specifically relying upon the *Hendry* case, was of the utmost pertinence—indeed, of controlling weight.

III

The decision below is contrary to the principle that federal courts should encourage or direct state court litigation to determine doubtful state law.

Points I and II, *supra*, reveal that there are two issues involved in this proceeding as to which there is at least substantial doubt as to the applicable state law. As to one issue, the Court below itself admits that it knows of no explicit rationale in the state decisions, and as to the other there is admittedly no direct support for the distinction by which it dismisses otherwise controlling state

decisions. Under such circumstances, we submit that the Court below should have directed or encouraged prompt litigation in the state courts in order to obtain conclusive answers to both questions. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478 (1940); *Spector Motor Service* v. *McLaughlin*, No. 62, Oct. Term, 1944, December 4, 1944. In the former case, which was also a bankruptcy proceeding, this Court stated that "Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State, which in such matters is supreme" (p. 484). The reason is equally valid here.

There has been one attempt at state court litigation of the issues. That action was enjoined and the injunction affirmed by the Court below, because the joinder there, as defendants, of both petitioner and the objectors in the instant case might have resulted in a judgment interfering with the exercise of jurisdiction by the bankruptcy court and because the complaint did not adequately present the issues. *Brooklyn Trust Co.* v. *Kelby*, 134 F. 2d 105 (1943), certiorari denied, 319 U. S. 767. The *Thompson* case was not cited either to the Court below or in the petition for certiorari. Moreover, both objections to that state court suit can readily be avoided; neither is a fundamental bar to the state court litigation of the basic questions here involved.

The sound policy which led this Court to direct the Federal courts in the *Spector Motor Co.* and *Thompson* cases to withhold judgment until state law could be

determined by state court litigation, seems even more clearly applicable here. In those cases, the Federal courts could at least have given an answer which would not have jeopardized the parties in the future. Here, however, petitioner is subject to action in the state courts of New York by bondholders who may have sold their bonds, as in the *Smith* case, *supra*, with no assurance whatever that the New York courts will accept as state law the holdings of the Court below.

CONCLUSION

The decision below is not only of major concern to petitioner, faced as it is with a tremendous surcharge for a good faith misinterpretation of a complex trust agreement, but it is also of far reaching effect on all fiduciaries. Collateral trust funds of this character are numerous and there are a vast number of them in existence in New York. The decision below, which certainly breaks new ground, must necessarily affect the performance and responsibility of fiduciaries under these agreements. Moreover, since there are now pending several other proceedings involving other trustees under other trust agreements with the Debtor in which the same issues are involved, a determination by this Court now will obviate the need for much future litigation.

Wherefore, your petitioner respectfully requests that writs of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

February 28, 1945.

President and Directors of the Manhattan Company,
Petitioner.

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